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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VINCE BONATO, On Behalf of Himself and All
Others Similarly Situated,

Plaintiff,

vs.

YAHOO! INC., CAROL A. BARTZ, and JERRY
YANG,

Defendants.

No. 3:11-cv-02732 - CRB

NOTICE OF MOTION AND MOTION
OF ALAN HERTZ FOR
APPOINTMENT AS LEAD PLAINTIFF
AND FOR APPROVAL OF LEAD
PLAINTIFF'S SELECTION OF LEAD
COUNSEL; MEMORANDUM OF LAW
IN SUPPORT THEREOF

Date: September 9, 2011
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Hon. Charles R. Breyer

ORAL ARGUMENT REQUESTED

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NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

PLEASE TAKE NOTICE that putative class member Alan Hertz (“Movant”) will hereby move this Court in the courtroom of the Honorable Charles R. Breyer at the United States District Courthouse, Northern District of California, San Francisco Division, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, on September 9, 2011 at 10:00 a.m., or as soon thereafter as the matter may be heard, for an order appointing Movant as lead plaintiff in the above-captioned action pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4, *et seq.*, and approving his selection of Scott+Scott LLP (“Scott+Scott”) as lead counsel for the putative class.

This timely-filed motion is made on the ground that Movant is the most adequate lead plaintiff. As demonstrated herein, Movant has the largest financial interest in the relief sought by the class, and meets the adequacy and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure. Accordingly, pursuant to the applicable standards, the Court should appoint Movant Lead Plaintiff and approve his selection of Scott+Scott to serve as lead counsel for the putative class.

This motion is based on this notice of motion and memorandum of law, the Declaration of Joseph D. Cohen (“Cohen Decl.”) in support thereof, the pleadings and other files and records in this action and such other written or oral argument as may be presented to the Court.

MEMORANDUM OF LAW

I. INTRODUCTION

This case is a class action that alleges violations of the federal securities laws. Pursuant to the PSLRA, the Court is required to appoint as lead plaintiff the movant with the largest financial interest in the litigation who also satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. Movant respectfully submits this memorandum in support of his motion to be appointed lead plaintiff pursuant to Section 21D of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §78u-4(a)(3)(B), as amended by the PSLRA, and for approval of his selection of the law firm of Scott+Scott as lead counsel for the class.

1 The PSLRA establishes a three-step procedure for the selection of a lead plaintiff to oversee a
 2 class action brought under the federal securities laws. *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th
 3 Cir. 2002). First, §27(a)(3)(A)(i) provides that within 20 days after the date on which a securities
 4 fraud class action is filed, the initial plaintiff is required to publish a notice advising potential class
 5 members of the pendency of the action, the claims, the purported class period, and that any member
 6 of the class may file a motion with the Court to serve as lead plaintiff no later than 60 days from the
 7 publication of that notice. 15 U.S.C. §78u-4(a)(3)(A)(i). Notice in this action was first published on
 8 June 6, 2011. *See* Cohen Decl., Ex. A.

9 Second, §21D(a)(3)(B)(i) directs this Court to consider any motions brought by class
 10 members seeking to be appointed as lead plaintiff no later than 90 days after publication of the
 11 notice. Under this provision of the Exchange Act, the Court shall appoint the “most adequate
 12 plaintiff” to serve as lead plaintiff for the class. The Exchange Act provides that the Court shall
 13 presume the lead plaintiff to be the person (or group of persons) who: (1) has either filed a
 14 complaint or moved for lead plaintiff in response to a notice; (2) “has the largest financial interest in
 15 the relief sought”; and (3) satisfies the typicality and adequacy requirements of Federal Rule of Civil
 16 Procedure 23. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

17 Finally, after the presumptive lead plaintiff has been identified, other class members have “an
 18 opportunity to rebut the presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality and
 19 adequacy requirements.” *Cavanaugh*, 306 F.3d at 730.

20 Application of these standards makes clear that Movant is “the most adequate plaintiff,” and
 21 that he should be appointed to serve as lead plaintiff. As an initial matter, Movant believes that he
 22 has the largest financial interest in the relief sought in this action by virtue of his \$99,530.30 loss
 23 stemming from his purchases of Yahoo! Inc. (“Yahoo” or the “Company”) securities during the time
 24 period extending from April 19, 2011 through May 13, 2011, inclusive (the “Class Period”). *See*
 25 Cohen Decl., Ex. B. Moreover, Movant shares a commonality of interests with all other class
 26 members because he purchased Yahoo securities on the open market during the Class Period. Cohen
 27 Decl., Ex. C. He has also demonstrated, through his selection of experienced and dedicated counsel,

1 that he is fully capable of supervising this litigation. Cohen Decl., Ex. D. Thus, Movant satisfies the
2 typicality and adequacy requirements of Rule 23.

3 Assuming the Court appoints Movant to serve as lead plaintiff, it should also approve
4 Movant's selection of Scott+Scott to serve as lead counsel. Scott+Scott has extensive experience in
5 the prosecution of securities class actions and will adequately represent the interests of all class
6 members as lead counsel. *See* Cohen Decl., *id.*

7 II. PRELIMINARY STATEMENT

8 Presently pending before this Court is the above-captioned action (the "Action") brought on
9 behalf of a class of purchasers of Yahoo securities. The Action alleges violations of Sections 10(b)
10 and 20(a) of the Exchange Act and SEC Rule 10b-5 by Yahoo and certain of the Company's officers
11 and/or directors (hereinafter referred to collectively as "Defendants"). Specifically, the Action
12 alleges that plaintiff and the putative class purchased or otherwise acquired Yahoo securities at
13 artificially inflated prices during the Class Period as a result of Defendants' allegedly false and
14 misleading statements and/or omissions.

15 III. FACTUAL BACKGROUND

16 Yahoo operates as a digital media company that delivers personalized digital content and
17 experiences worldwide. In 2005, Yahoo invested \$1 billion for a 40% interest in Alibaba Group
18 Holdings Limited ("Alibaba"), China's largest e-commerce company. Yahoo also turned over
19 operation of Yahoo China to Alibaba. One of Alibaba's most valuable assets is Alipay, a company
20 that allows customers to purchase goods over the internet, much like the PayPal function on EBay.
21 Some analysts have valued Alipay as being worth over \$5 billion.

22 The complaint in this Action alleges that during the Class Period, Defendants issued
23 materially false and misleading statements and/or omitted to disclose material facts. Specifically,
24 Defendants failed to disclose that Alipay had been transferred to an entity controlled by Alibaba's
25 Chairman, Jack Ma, for \$46 million – a fraction of its actual value. As a result of Defendants' false
26 statements and omissions, Yahoo's stock traded at artificially inflated prices during the Class Period,
27 reaching a high of \$18.65 per share on May 6, 2011. On May 12, 2011, Defendants issued a press
28

1 release in which they admitted that Yahoo's management had been informed on March 31, 2011, of
 2 the transfer of ownership of Alipay in August of 2010. According to Alibaba, however, Defendants
 3 knew much earlier. In a press release on May 13, 2011, the last day of the Class Period, Alibaba
 4 stated that Defendants had been told long before March 31, 2011, that Alipay had been transferred to
 5 Chinese ownership. As a result of these revelations, Yahoo stock traded on unusually high volume
 6 on May 13, 2011, and closed at \$16.55, a substantial drop from its Class Period high of \$18.65.

7 **IV. ARGUMENT**

8 **A. Movant Should Be Appointed as Lead Plaintiff**

9 **1. Movant's Motion Is Timely**

10 The plaintiff who files the initial action must publish a notice to the class within 20 days of
 11 filing the action informing class members of their right to file a motion for appointment as lead
 12 plaintiff. 15 U.S.C. §78u-4(a)(3)(A)(i). On June 6, 2011, a notice of pendency of this class action
 13 was published by the plaintiff via *Business Wire*, a company that disseminates full-text news releases
 14 from thousands of companies and organizations worldwide to news media, financial markets,
 15 disclosure systems, investors, information websites, databases and other audiences; providing the
 16 requisite notice as required by the Exchange Act. Cohen Decl., Ex. A. Because notice was
 17 published on *Business Wire* within 20 days of the Action being filed, notice was timely. *See* 5 James
 18 Wm. Moore, MOORE'S FEDERAL PRACTICE, §23.191[2] at 23-613 (3rd ed. 1999) ("a press release on
 19 *Business Wire*, which disseminates the information electronically to the news media, on-line
 20 services, and computer databases available to the investment community, satisfies the early notice
 21 requirement").

22 Class members seeking appointment as lead plaintiff in this Action must make a motion
 23 within 60 days from June 6, 2011 (*i.e.*, August 5, 2011). 15 U.S.C. §78u-4(a)(3)(B)(i). Since
 24 Movant's motion was filed by August 5, 2011, it is timely. 15 U.S.C. §78u-4(a)(3)(A)(i)(II).

2. Movant Believes that He Possesses the Largest Financial Stake in the Relief Sought by the Class

The Exchange Act requires this Court to adopt a rebuttable presumption that the most adequate plaintiff in any private action arising under this title is the person or group of persons that “has the largest financial interest in the relief sought by the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb). While the PSLRA does not provide a method for determining the relative financial interests of lead plaintiff movants, Courts of the Ninth Circuit and others have adopted the four-factor *Lax* inquiry to determine the “largest financial interest” under the PSLRA: (1) the total number of shares purchased during the class period; (2) the net shares purchased during the class period (*i.e.*, the difference between the number of shares purchased and the number of shares sold during the class period); (3) the net funds expended during the class period (*i.e.*, the difference between the amount spent to purchase shares and the amount received for the sale of shares during the class period); and (4) the approximate losses suffered. *See Richardson v. TVIA, Inc.*, No. C06-06304-RMW, 2007 WL 1129344 (N.D. Cal. April 16, 2007); *Lax v. First Merchants Acceptance Corp.*, No. 97 C 2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997); *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. LaBranche & Co.*, 229 F.R.D. 395, 404 (S.D.N.Y. 2004); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998).

Here, Movant purchased 45,000 shares of Yahoo common stock during the Class Period, spent approximately \$765,000 acquiring the shares, and sold them all for \$665,469.70 after disclosure of the true state of affairs, for a loss of \$99,530.30. *See Cohen Decl.*, Exs. B and C. Thus, Movant believes he has the largest financial interest in this case and should be appointed to serve as lead plaintiff.

3. Movant Is Otherwise Qualified Under Rule 23

Section 21D(a)(3)(B)(iii)(I)(cc) of the Exchange Act provides the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C.

§78u-4(1)(3)(B)(iii)(I)(cc). In this regard, Rule 23(a) requires generally that the plaintiff's claims be typical of the claims of the class and that the representative fairly and adequately protect the interests of the class. As detailed below, Movant satisfies the typicality and adequacy requirements of Rule 23(a) and is qualified to be appointed as lead plaintiff in this case.

The typicality requirement of Rule 23(a)(3) is satisfied when the representative plaintiff has: (1) suffered the same injuries as the absent class members, (2) as a result of the same course of conduct by defendants, and (3) their claims are based on the same legal issues. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Armour v. Network Assoc., Inc.*, 171 F. Supp. 2d 1044, 1052 (N.D. Cal. 2001). The Ninth Circuit has held that Rule 23(a)(3) should be interpreted somewhat permissively and that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1997).

Here, the questions of law and fact common to the members of the class that predominate over questions that may affect individual class members include the following:

- (i) whether the Exchange Act was violated by Defendants; and
- (ii) whether the members of the class have sustained damages and, if so, what is the proper measure of damages.

As a result, there is a well-defined community of interest in the questions of law and fact involved in this case. Movant, like the rest of the putative class, acquired Yahoo securities during the Class Period at prices that allegedly were artificially inflated by Defendants' wrongful conduct. His claims are, therefore, based on the same legal theories and arise "from the same event or practice or course of conduct that gives rise to the claims of other class members." Newberg, *et al.*, NEWBERG ON CLASS ACTIONS, §3:13 (4th ed. 2002). Thus, the typicality requirement is satisfied. *Id.*

The adequacy of representation prong of Rule 23(a)(4) is satisfied where it is established that a representative party "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *Hanlon*, 150 F.3d at 1020. In order to satisfy this requirement, a prospective lead plaintiff

1 must show that he, she, or it does not have any conflicts of interest with other class members and that
 2 the plaintiff and counsel will vigorously prosecute the case. *In re Cooper Companies Inc. Sec. Litig.*,
 3 254 F.R.D. 628, 636 (C.D. Cal. 2009). The key inquiry is not whether another movant might do a
 4 better job of protecting the interests of the class than the presumptive lead plaintiff; instead, the
 5 question is whether anyone can prove that the presumptive lead plaintiff will not do a fair and
 6 adequate job. *Cavanaugh*, 306 F.3d at 732.

7 Here, Movant will more than adequately represent and protect the interests of the class. First,
 8 because he purchased a significant number of shares on the open market during the Class Period,
 9 Movant's interests are clearly aligned with the members of the proposed class. Second, there is no
 10 evidence of any antagonism between Movant's interests and the interests of the proposed class
 11 members. Third, as detailed above, Movant shares substantially similar questions of law and fact
 12 with the members of the proposed class and his claims are typical of the members of the class.
 13 Fourth, Movant's sworn Certification demonstrates his willingness to serve as, and assume the
 14 responsibilities of, a class representative. Cohen Decl., Ex. C. Finally, Movant has taken steps that
 15 will promote the protection of interests of the class by selecting proposed lead counsel who are
 16 qualified, experienced and able to conduct this complex litigation in a professional manner. *See*
 17 Cohen Decl., Ex. D. Accordingly, Movant satisfies the requirements of Rule 23 necessary for
 18 appointment as lead plaintiff in this action.

19 In sum, Movant should be appointed lead plaintiff in the Action pursuant to 15 U.S.C. §78u-
 20 4(a)(3)(B) because he has the largest financial interest in this Action and he satisfies the typicality
 21 and adequacy requirements of Rule 23.

22 **B. The Court Should Approve Movant's Choice of Counsel**

23 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to
 24 this Court's approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v); *Cavanaugh*, 306 F.3d at 734-35. As such,
 25 this Court should not disturb the lead plaintiff's choice of counsel unless it is necessary to "protect
 26 the interests of the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa).

Here, Movant has selected the law firm of Scott+Scott to represent the class. Scott+Scott has served as lead or co-lead counsel in many high-profile securities class actions, and recovered hundreds millions of dollars for investors and others harmed by corporate mismanagement. *See* Cohen Decl., Ex. D. For example, Scott+Scott obtained: a settlement of \$80 million for a class of purchasers of Priceline stock in *In re Priceline.com Sec. Litig.*, No. 00-01844 (D. Conn.); a \$122 million settlement for purchasers of Mattel stock in *Thurber v. Mattel, Inc.*, No. 99-10368 (C.D. Cal.); and a \$70 million settlement for purchases of Credit Suisse Group securities in *Cornwell v. Credit Suisse Group*, No. 08-3758 (S.D.N.Y.). Additional securities settlements include: *In re Emulex Corp. Sec. Litig.*, No. 01-00219 (C.D. Cal.) (settlement of \$39 million); *In re Sprint Sec. Litig.*, No. 00-230077 (Cir. Ct. Jackson County, Mo.) (settlement of \$50 million); *In re Northwestern Corp. Sec. Litig.*, No. 03-04049 (D.S.D.) (settlement of \$61 million); *Irvine v. Imclone Systems, Inc.*, No. 02-00109 (S.D.N.Y.) (settlement of \$75 million); and *Schnall v. Annuity and Life Re (Holdings) Ltd.*, No. 02-02133 (D. Conn.) (settlement of \$27 million).

Scott+Scott has also successfully represented shareholders in derivative actions seeking important corporate reforms. *See, e.g., In re Qwest Communications International, Inc.*, No. 02-08188 (Colorado District Court, City and County of Denver) (shareholder derivative settlement including significant corporate governance reforms and \$25 million for the company); and *In re Lattice Semiconductor Corp. Deriv. Litig.*, No. 043327 (Cir. Ct. Oregon) (significant monetary recovery and business reforms, including termination of the then-CEO and adoption of significant changes to the company's auditing, insider trading, executive compensation and other internal practices). Given this track record, it cannot be disputed that Scott+Scott possesses, and will commit, the financial resources, expertise and manpower necessary to successfully litigate this action on behalf of lead plaintiff and the class.

In short, Movant's choice of lead counsel satisfies the requirements of the PLSRA and Scott+Scott is ideally suited to serve as lead counsel in this litigation.

V. CONCLUSION

For all the foregoing reasons, Movant respectfully requests that the Court appoint him to serve as lead plaintiff in the Action pursuant to §27D(a)(3)(B) of the Exchange Act, as amended by the PSLRA, 15 U.S.C. §78u-4, and approve Movant's selection of the law firm of Scott+Scott LLP to serve as lead counsel pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v).

DATED: August 5, 2011

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 5, 2011.

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